

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)
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v.) No. 03-10230-01-WEB
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MARICO M. LaFLORA,)
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Memorandum and Order

This matter came before the court on July 16, 2004, for a sentencing hearing, at which time the court ruled orally on the defendant's objections to the Presentence Report. This written memorandum will supplement the oral rulings made by the court.

Background.

On April 21, 2004, defendant Marico LaFlora was found guilty by a jury on a two-count Indictment charging bank robbery in violation of 18 U.S.C. § 2113(a) & (d) and § 2 (Count 1), and using, carrying or brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) and § 2 (Count 2). The U.S. Probation Office prepared a Presentence Report calculating the defendant's sentencing range under the federal sentencing guidelines as follows:

¶18	<u>Base Offense Level for bank robbery (USSG §2B3.1) (2003 Manual)</u>	20
¶19	<u>Enhancement because property of a financial institution was taken (b)(1)</u>	+2
¶20	<u>Enhancement because a victim was physically restrained in the offense (b)(4)(B)</u>	+2
¶21	<u>Enhancement for victim loss between \$50,000 and \$250,000 (b)(7)(C)</u>	+2
¶28	<u>TOTAL OFFENSE LEVEL</u>	= 26

An offense level of 26 together with the defendant's Criminal History Category of II results in a guideline sentencing range of 70-87 months on Count 1. A 25-year consecutive sentence is required by statute on Count 2 because this is the defendant's second conviction under § 924(c). *See* 18 U.S.C. § 924(c)(1)(C)(i).

Defendant's Objections.

The defendant has objected to the guideline calculation based on the Supreme Court's recent decision in *Blakely v. Washington*, ___ U.S. ___, 2004 WL 1402697, which invalidated a sentence imposed under the State of Washington's sentencing guidelines. The Court did so because the judge in that case increased the defendant's guideline sentence based upon facts that were not found by the jury or admitted by the defendant. The Supreme Court found that doing so violated the defendant's Sixth Amendment right to trial by trial.

Defendant argues that under *Blakely* it would be unconstitutional for this court to include enhancements in his guideline calculation that are based on facts not found by the jury. Specifically, defendant argues it would be unconstitutional to apply the 2-level enhancement for "physically restraining a victim" and the 2-level enhancement for the "victim's loss being between \$50,000 and \$250,000," because those allegations were not found by the jury. Defendant argues that his offense level on Count 1 should be a total of 22, resulting in a sentencing range of 46-57 months on Count 1.¹

Counsel for the United States initially agreed that the two challenged enhancements should not be

¹ Defendant apparently concedes that the court may constitutionally apply the remainder of the Guidelines. Moreover, defendant concedes that *Blakely* does not prohibit application of the base offense level of 20 and the 2-level enhancement for taking the property of a financial institution, because the facts necessary to support these provisions were implicitly found by the jury in its verdict of guilty.

applied, but due to recent policy statements from the Department of Justice, the Government now argues that *Blakely* does not affect the federal sentencing guidelines and that the federal courts should continue apply the guidelines in their entirety. The Government further states that if the Court rejects this argument and finds that *Blakely* does apply, the court should consider imposing alternative sentences, with one sentence determined under the guidelines and an alternative non-guideline sentence that is within the statutory maximum for the offense.

Discussion.

As an initial matter, the court finds that the rule of *Blakely* must be applied to the federal sentencing guidelines, because there is no material difference between the state guidelines at issue in *Blakely* and the federal guidelines.² Like the Washington guidelines, the federal guidelines have the force of law, and they obligate a judge to impose a sentence below a specified guideline maximum unless the judge makes additional findings of fact which warrant the application of various adjustments, enhancements, or upward departures.³ This procedure of allowing a judge to determine facts at sentencing which result in increases to the applicable guideline range is precisely the flaw identified by the Court in *Blakely*, because it allows a judge to increase the “statutory maximum sentence” based on facts not found by a jury or admitted by

² See *United States v. Croxford*, ___ F.Supp.2d ___, 2004 WL 1551564 (D. Utah, July 12, 2004) (finding that “the federal Guidelines cannot be distinguished, at least as to any constitutionally significant point, from the ... guidelines at issue in *Blakely*.”); *United States v. Booker*, ___ F.3d ___, 2004 WL 1535858 (7th Cir., July 9, 2004) (same); and *United States v. Shamblin*, 2004 WL 1468561 (S.D.W.Va., June 30, 2004) (also finding that *Blakely* applies). But see *United States v. Pineiro*, 2004 WL 1543170 (5th Cir., July 12, 2004) (finding *Blakely* does not apply to the federal guidelines).

³ Section 3553(b) of Title 18 requires the court to impose a sentence within the range determined by the Guidelines unless it finds aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines.

the defendant.⁴ Based on *Blakely*, the court concludes it would violate the defendant's Sixth Amendment rights to increase his offense level (and sentencing range) based upon facts not found by the jury or otherwise admitted. The court therefore agrees with the defendant that the enhancements for "restraining a victim" and for the "amount of the loss" may not be applied because those facts were not found by the jury. The defendant's objection to these two enhancements is sustained.

The courts are already divided over whether it is appropriate in this situation to apply the *remaining* guidelines (that is, the guidelines and enhancements that are based solely on facts found by the jury), or whether it would undermine Congress' intent to apply fewer than all of the guidelines, such that the court should treat the guidelines as merely being advisory and resort to the former system of exercising complete discretion to impose a sentence anywhere within the statutory maximum.⁵

This Court concludes that the better approach is to continue to apply the guidelines which can be applied solely from the facts determined by the jury in its verdict or otherwise admitted by the defendant. This approach furthers the Congressional goal of promoting a measure of uniformity in sentencing,

⁴ In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court applied this rule to the State of Washington's sentencing guidelines, and found that "the statutory maximum" sentence for purposes of *Apprendi* was the maximum sentence that a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.

⁵ See e.g., *United States v. Montgomery*, 2004 WL 1562904 (6th Cir., July 14, 2004) ("In light of *Blakely*, and the language of the enabling act itself, a district judge should no longer view herself as operating a mandatory or determinate sentencing system, but rather should view the guidelines in general as recommendations to be considered and then applied only if the judge believes they are appropriate and in the interests of justice in the particular case) and *United States v. Montgomery*, 2004 WL 1535646 (D.Utah, July 8, 2004) (stating that the court would continue to apply the guidelines to the extent they do not require any additional fact-finding by the court beyond those facts found by the jury or admitted by the defendant).

particularly in view of the fact that the guidelines will likely to continue to be applied in cases where defendants plead guilty -- which represent the overwhelming number of criminal cases.⁶ And, as Judge Stewart of the District of Utah noted in *Montgomery*, supra, this approach is consistent with the principle of statutory construction that courts should “save and not destroy” the law by construction.

Under this approach, the court finds that defendant’s base offense level is 20, and he is subject to the 2-level increase for taking property belonging to a financial institution. This results in a total offense level of 22 and a guideline sentencing range of 46-57 months. The court finds a sentence of 46 months imprisonment is appropriate as to Count 1.

The court will also impose an alternative sentence in this case that would apply in the event the Guidelines as a whole are subsequently determined to be unconstitutional or are found to be no longer binding. Even if the guidelines were not binding in this case, the court in its discretion would impose the same 46-month sentence on Count 1, as the court finds this represents a fair and just punishment for the defendant’s bank robbery offense.

Conclusion.

The court concludes that the *Blakely* decision applies to the federal sentencing guidelines. The court further finds that it would violate the defendant’s Sixth Amendment right to trial by jury to apply the enhancements of USSG § 2B3.1(b)(4)(B) and § 2B3.1(b)(7)(C) in determining the defendant’s sentence because the facts underlying these enhancements were not found by the jury or otherwise admitted by the defendant. Accordingly, the defendant’s objections to the Presentence Report are SUSTAINED.

⁶ The U.S. Attorney’s Office in this district has already incorporated into its current plea agreements a provision stating that the defendant agrees to waive any *Blakely* rights relating to sentencing.

Applying those guidelines which are not affected in this case by *Blakely*, the court finds that the defendant's offense level is 22 and his Criminal History Category is II, resulting in an applicable guideline range of 46-57 months imprisonment on Count 1. The guideline (and statutory) sentence on Count 2 remains 25 years' imprisonment consecutive to Count 1.

The Probation Officer in charge of this case shall see that a copy of this order is appended to any copy of the Presentence Report made available to the Bureau of Prisons. IT IS SO ORDERED this 16th __ Day of July, 2004, at Wichita, Ks.

s/Wesley E. Brown

Wesley E. Brown

U.S. Senior District Judge